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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM 1967

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PROTECTION MUTUAL INSURANCE COMPANY, *Petitioner*

v.

PLANTERS MANUFACTURING COMPANY

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PROTECTION MUTUAL INSURANCE COMPANY, *Petitioner*

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PLANTERS MANUFACTURING COMPANY

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Protection Mutual Insurance Company prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-captioned case on May 26, 1967.

### OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a-24a) was not reported as of the date upon which this petition was filed. The opinion of the trial court (App., *infra*, pp. 25a-38a) granting petitioner's motion for judgment n.o.v. and entering judgment thereon is reported at 244 F.Supp. 721.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether a federal court sitting in a diversity case must apply a federal test of sufficiency of the evidence to support a jury verdict where the applicable state standard is admittedly different and would produce a contrary result.

2. If a federal standard must be applied, should it be:

(a) that set forth in *Pennsylvania Railroad* v. *Chamberlain,* 288 U.S. 333, 339 (1932), *i.e.* "Where proven facts give equal support to each of two inconsistent inferences . . . judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of those inferences as against the other," or

(b) that contained in *Lavender* v. *Kurn,* 327 U.S. 645, 653 (1946), to the effect that equally conflicting inferences are "immaterial" and judgment n.o.v. can be granted "only when there is a complete absence of probative facts to support the conclusion reached."

## STATEMENT

This is a diversity action involving a dispute between an insurer and its insured over the question of coverage for loss which resulted from the collapse of a soybean warehouse located in Clarksdale, Mississippi. Following the loss the insured, respondent herein, made claim on petitioner, an Illinois insurance

corporation, for $193,000, contending the loss was caused by a soybean dust explosion and thus covered under petitioner's insurance policy issued on the building in question. The insurer denied liability on the ground the loss was not caused by a peril insured against under the policy. The insured thereupon filed suit in the United States District Court for the Northern District of Mississippi and demanded a jury trial.

At trial, the insured took the position that the collapse of the building was triggered by a small explosion of soybean dust which occurred somewhere in the midst of the large open space inside the warehouse. The insurer's defense was that it was scientifically impossible for the loss to have occurred as the insured claimed and that the collapse was actually caused by overloading of the warehouse, an uninsured peril.

The jury returned a verdict for the insured. The insurer moved for a judgment n.o.v. or in the alternative for a new trial. In granting the motion for judgment n.o.v., the trial court applied the standard of *Pennsylvania Railroad* v. *Chamberlain,* 288 U.S. 333 (1932), and held that the conflicting inferences from the evidence were equally balanced and hence the jury's selection of one of the conflicting inferences was necessarily based on conjecture.

The Fifth Circuit reversed. Before making its factual analysis, it squarely raised and decided the two questions presented herein. As to the first, it held that a federal district court sitting in a diversity case must apply a federal rather than the state test for sufficiency of the evidence in support of a jury verdict even though, as here, the state standard is admittedly different and would yield a different result. In so holding, the court of appeals recognized that

there is a conflict among the circuits on this point and that this Court has yet to rule on the issue.

Having held that a federal standard must be applied, the appellate court then proceeded to determine the federal standard. Recognizing a distinct difference between the test set forth in *Pennsylvania Railroad* v. *Chamberlain*, 288 U.S. 333 (1932), and that in *Lavender* v. *Kurn*, 327 U.S. 645 (1946), it chose the latter, holding that (App. p. 8a):

> If proven facts do give support to the inference necessary to sustain a plaintiff's case, then, under the rule of *Lavender*, it is immaterial that they give equal suport to a contrary inference. It is only when there is a *complete absence* of probative facts to support the conclusion reached that the jury's judgment may be ignored.

In so holding, it concluded that the considerations supporting the rule restricting the trial court in FELA cases were not limited to such actions but applied to all jury cases as well.

Applying the *Lavender* standard, the court of appeals found that there was not a complete absence of probative facts to support the insured's position and vacated the judgment n.o.v.

## REASONS FOR GRANTING THE WRIT

1. This case presents an issue which the Court characterized as "important" in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445 (1959), because of its nature and a conflict among the circuits. However, it was left undecided in that case because the applicable federal and state standards for sufficiency of evidence

in support of a jury verdict were "substantially the same." *Ibid.* It was presented again in *Mercer* v. *Theriot*, 377 U.S. 152 (1964), and certiorari was granted to resolve the conflict but once more the issue evaporated upon a subsequent finding that "the evidence was sufficient under any standard that might be applied—state or federal" *Id.* at 156.

The conflict remains[1] while the circuit courts and litigants await final resolution from this Court. The

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[1] The following cases have held that state law is controlling:

Second Circuit: *Rowe v. Pennsylvania Greyhound Lines, Inc.*, 231 F. 2d 922 (1956), *cert denied*, 351 U.S. 984; *Gutierrez v. Public Serv. Interstate Transp. Co.*, 168 F. 2d 678 (1948). Third Circuit: *McDermott v. John Hancock Life Ins. Co.*, 255 F. 2d 562 (1958); *Moran v. Pittsburgh-Des Moines Steel Corp.*, 166 F. 2d 908 (1948), *cert denied*, 334 U.S. 846; *Waldron v. Aetna Cas. & Sur. Co.*, 141 F. 2d 230 (1944); *Cooper v. Brown*, 126 F. 2d 874 (1942). Sixth Circuit: *Gilreath v. Southern R.R.*, 323 F. 2d 158 (1963); *Trivette v. New York Life Ins. Co.*, 283 F. 2d 441 (1960); *Lovas v. General Motors Corp.*, 212 F. 2d 805 (1954); *O'Donnell v. Geneva Metal Wheel Co.*, 190 F. 2d 59 (1950). Seventh Circuit: *Wieloch v. Rogers Cartage Co.*, 290 F. 2d 235 (1961); *Nattens v. Grolier Soc'y, Inc.*, 195 F. 2d 449 (1952). Eighth Circuit: *Hanson v. Ford Motor Co.*, 278 F. 2d 586 (1960); *Continental Can Co. v. Horton*, 250 F. 2d 637 (1957); *Stofer v. Montgomery Ward & Co.*, 249 F. 2d 285 (1957); *Nichols v. Skelly Oil Co.*, 175 F. 2d 113 (1949); *Clay County Cotton Co. v. Home Life Ins. Co.*, 113 F. 2d 856 (1940).

On the other hand, the following cases have found federal law to be controlling on the question of the appropriate test for sufficiency of the evidence in support of a jury verdict:

Second Circuit: *Reynolds v. Pegler*, 223 F. 2d 429 (1955). Third Circuit: *Woods v. National Life & Acc. Ins. Co.*, 347 F. 2d 760 (1965); *Lind v. Schenley Indus., Inc.*, 278 F. 2d 79 (1960), *cert denied*, 364 U.S. 835; *Guardian Life Ins. Co. of Am. v. Clum*, 106 F. 2d 592 (1939). Fourth Circuit: *Pine-*

problem has not diminished but continues to grow with the increasing volume of jury trials in federal trials in federal diversity cases.

The instant case presents an appropriate and compelling vehicle for resolving this continuing conflict and the issue involved therein. Unlike *Dick* and *Mercer* v. *Theriot*, there is a meaningful difference between the federal and state standards involved in this case. As the Fifth Circuit correctly noted (App. p. 2a):

> A reading of the opinion of the Supreme Court of Mississippi in the case of *Denman* v. *Spain*, 135 So. 2d 195 (1961) convinces us that a choice

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*hurst, Inc. v. Schlamowitz*, 351 F. 2d 509 (1965); *Burcham v. J. P. Stevens & Co.*, 209 F. 2d 35 (1954); *Davis Frozen Foods, Inc. v. Norfolk-So. Ry.* 204 F. 2d 839 (1953), *cert denied*, 346 U.S. 824; *Guthrie v. Great American Ins. Co.*, 151 F. 2d 738 (1945); *McSweeney v. Prudential Ins. Co.*, 128 F. 2d 660 (1942), *cert denied*, 317 U.S. 658; *Gorham v. Mutual Ben. Health & Acc. Ins. Co.*, 114 F. 2d 97 (1940), *cert denied*, 312 U.S. 688 (1941). Fifth Circuit: *Shirey v. Louisville & N. Ry.*, 327 F. 2d 549 (1964); *Kirby Lumber Corp. v. White*, 288 F. 2d 566 (1961); *Rutherford v. Illinois Cent. R. R.*, 276 F. 2d 330 (1960); *Revlon v. Buchanan*, 271 F. 2d 795 (1959); *Fruit Indus., Inc. v. Petty*, 268 F. 2d 391 (1959); *Royal Indem. Co. v. Curtis*, 256 F. 2d 329 (1958); *New Amsterdam Cas. Co. v. Wood*, 253 F. 2d 71 (1958); *Pogue v. Great A. & P. Tea Co.*, 242 F. 2d 575 (1957); *Reuter v. Eastern Airlines*, 226 F. 2d 443 (1955); *Wright v. Paramount-Richards Theatres, Inc.*, 198 F. 2d 303 (1952); *Lowry v. Seaboard Airline R. R.*, 171 F. 2d 625 (1948); *White v. New York Life Ins. Co.*, 145 F. 2d 504 (1944). Eighth Circuit: *F. W. Woolworth Co. v. Carriker*, 107 F. 2d 689 (1939). Ninth Circuit: *Safeway Stores v. Fannan*, 308 F. 2d 94 (1962); *Phipps v. N. V. Nederlandsche Amerikaansche Stoomvart, Maats*, 259 F. 2d 143 (1958). Tenth Circuit: *Diederich v. American News Co.*, 128 F. 2d 144 (1942).

is necessary to decision here. The state standard employed there is summarized in the following excerpts from the Court's opinion:

> By the use of metaphysical learning, *speculation and conjecture,* one may reach several possible conclusion as to how the accident occurred. However, such conclusions could only be classed as possibilities; and this Court has many times held that verdicts cannot be based on possibilities. *Id.* at 197. (Emphasis added.)

> We apprehend a vital difference between this standard and that announced by the Supreme Court of the United States in *Lavender* v. *Kurn,* 327 U.S. 645 (1946), (explored fully hereinafter) as applied to the facts of the case before us.

Putting aside the ultimate question of whether a state or federal standard ought to be applied—which is more appropriate to a brief on the merits—it is clear that had the state standard been applied by the Court of Appeals the result would have been different. As the Fifth Circuit conceded, under the Mississippi standard—which is essentially the *Chamberlain* standard applied by the trial court—petitioner was entitled to a judgment n.o.v. because the insured's evidence constituted, at best, only an equally possible explanation for the loss. However, under the *Lavender* standard applied by the Fifth Circuit, "it is immaterial that evidence may equally support an inconsistent inference, if in fact fairminded men might draw from that evidence the inference sought by the party against whom a preemptory instruction is sought." (App. p. 17a). Thus this case does not present the problem present in *Mercer* v. *Theriot* and can

be undertaken in confidence that the issue will not "evaporate" once again.[2]

2. The second and equally demanding question presented in this petition is what the federal standard ought to be—assuming that a federal rather than state test should apply. On this question, the Fifth Circuit has now come into clear and irreconcilable conflict with the District of Columbia[3] and the Sixth circuits.[4] In so doing, it has joined with the

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[2] The fact that the Court of Appeals ultimately remanded this case for a new trial is not a basis for denial of this petition. The issue involved is important, clear-cut, absolutely fundamental to further proceedings in this case and otherwise qualifies as a basis for certiorari. Hence it can and should be reviewed despite its interlocutory status. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Land v. Dollar*, 330 U.S. 731, 734, n. 2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3 (1949). This is especially so where the conflict among the circuits is as great and deep as it is here. *United States v. General Motors Corp., op cit supra; Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-9 (1916); and the issue so important to the administration of civil justice, *Caroll v. United States*, 354 U.S. 394 (1957).

[3] In its opinion below, the Fifth Circuit relied on Judge Holtzoff's opinion in *Preston v. Safeway Stores, Inc.*, 163 F. Supp. 749 (D.D.C. 1958) as persuasive precedent for the proposition that *Chamberlain* had been overruled *sub silentio* and hence *Lavender* was controlling. However, it should be noted that on appeal the District of Columbia Circuit Court affirmed the result below, but clearly rejected that portion of Judge Holtzoff's opinion which relied on *Lavender*. *Safeway Stores v. Preston*, 269 F. 2d 781 (1959). In adopting Judge Miller's dissenting remarks in his opinion on rehearing, 269 F. 2d at 784, Judge Bastian made it clear that the court regarded *Lavender* as being limited to FELA cases and hence the *Chamberlain* standard still applies in that circuit.

[4] *Jellison* v. *Kroger Co.*, 290 F.2d 183 (6th Cir. 1961).

Eighth,[5] and possibly the Second,[6] Third,[7] and Ninth[8] circuits which have invoked *Lavender* v. *Kurn* but not squarely faced the "irreconcilable conflict" between that decision and *Chamberlain* in the manner or depth employed by the court below.

The issue is thus appropriate for determination by this Court and flows naturally from the first question involved herein. Once again it is not the purpose or function of this petition to argue the merits of what federal test of sufficiency ought to apply, if a federal standard is to be applied at all. However, it is appropriate to note with emphasis that the choice between *Chamberlain* and *Lavender* presents alternatives with far-reaching consequences to the administration of justice in the federal courts.

In chosing which federal standard to apply, it will be necessary to consider and resolve all of the interrelated and highly significant questions raised by the Fifth Circuit: whether the language often quoted from *Chamberlain* is in fact dictum; whether *Chamberlain* should be regarded as having been overruled *sub silentio* by *Lavender;* whether *Lavender* is indeed confined to FELA cases; whether *Rogers*[9] affirms or detracts from the limitations of *Lavender* to FELA, and whether the adoption of a *Lavender* test would

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[5] *Ahmann* v. *United Air Lines Inc.*, 313 F.2d 274 (8th Cir. 1963).

[6] *Berner* v. *British Commonwealth Pacific Airlines Ltd.*, 346 F.2d 532 (2d Cir. 1965).

[7] *Widger* v. *Errickson*, 339 F.2d 32 (3d Cir. 1964); *Bruce Lincoln-Mercury Inc.* v. *Universal C.I.T. Credit Corp.*, 325 F.2d 2, 22 (3d Cir. 1963).

[8] *Sherwood & Roberts-Kennewick Co.* v. *St. Paul F. & M. Ins. Co.*, 322 F.2d 70 (9th Cir. 1963).

[9] *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500 (1957).

in fact impair the traditional concept of burdens in the federal courts and make motions for judgments n.o.v. exercises in futility.

All of these matters, thoroughly discussed and reviewed by responsible commentators[10] are clearly ripe for decision without regard to the ultimate outcome of this case. What is necessary at this point is clarification and direction. The petitioner here, just as many such litigants similarly situated, will undoubtedly be facing the same issues tomorrow in a different circuit under a different set of rules for testing the sufficiency of evidence to support a jury verdict. If state standards are to apply, the petitioner and other litigants should know they will apply in every circuit. If federal standards are to apply, petitioner should know the limitations of that standard, its rationale, and that it will be uniform throughout the circuits.

This case thus presents an almost classic situation in which an appellate court has raised two interrelated issues in such a manner that its decision, in effect, respectfully invites review by this Court. The obvious hope is to finally resolve these important and far-reaching questions which to date have only produced uncertainty and continuing conflict among and within[11] the circuits.

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[10] See Comment, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 Tex. L. Rev. 1053, 1060 (1964). Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 158, 174 (1944); 5 Moore's Federal Practice (2d ed 1951) §§ 38.10, 50.06. 2B. Barron and Holtzoff, Federal Practice and Procedure (Wright ed.) § 1075 at pp. 400-401.

[11] See the variations within the Second and Third Circuit cases cited in no. 1, *supra*.

## CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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August 1967

## APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23019

PLANTERS MANUFACTURING COMPANY, *Appellant*,

versus

PROTECTION MUTUAL INSURANCE COMPANY, *Appellee*.

Appeal from the United States District Court for the Northern District of Mississippi.
(May 26, 1967.)

Before TUTTLE, Chief Judge, THORNBERRY and GOLDBERG, Circuit Judges.

TUTTLE, Chief Judge: The ultimate dispute here is whether plaintiff's soybean storage warehouse was damaged by a bean dust explosion (in which case defendant would be liable for the damage under a contract of insurance), or by a structural failure resulting from inadequate design, overloading, or a combination of both (risks not covered by the policy). Invoking the diversity jurisdiction of the United States District Court for the Northern District of Mississippi, plaintiff sought a judicial determination of this controversy. A jury resolved the dispute in plaintiff's favor. The trial judge, concluding that the evidence presented was inadequate to support the jury's verdict, granted the defendant's motion for judgment non obstante veredicto. Plaintiff appeals, contending that its right to a jury determination of disputed fact issues, secured by the seventh amendment to the Constitution of the United States, has been abridged by the trial judge's ruling.

I.

The first point urged by appellant is that in determining the sufficiency of the evidence to raise a question of fact

for the jury in diversity cases, federal courts must apply a federal test. The Supreme Court has yet to settle the conflict which exists among the courts of appeals on this issue.[1]

However, the Court's decisions in *Byrd* v. *Blue Ridge Rural Electric Cooperative,* 356 U.S. 525 (1958), and *Simler* v. *Conner,* 372 U.S. 221 (1963), strongly suggest that the question will eventually be resolved in favor of the federal test. *In Byrd,* the issue was whether a federal court sitting in diversity was bound under the rule of *Erie R. Co.* v. *Thompkins,* 304 U.S. 64 (1938), to follow a decision by the

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[1] In Dick v. New York Life Ins. Co., 359 U.S. 437, 444-45 (1959), the Court noted the disagreement between the circuits, but declined to "reach out to decide this important question," on the grounds that the standards there involved were substantially the same, and the point had not been briefed and argued by the parties.

Five years later, in Mercer v. Theriot, 377 U.S. 152 (1964), on an en banc case from this court, the Court again found decision of this question unnecessary to a disposition of the case. Citing the Dick case, the Court said: "The evidence was sufficient under any standard which might be appropriate—state or federal." (Justice Harlan, dissenting, expressed the view that since certiorari had been granted to determine which standard applied, the writ should have been dismissed as improvidently granted when it became apparent that decision of that question was unnecessary.)

A reading of the opinion of the Supreme Court of Mississippi in the case of Denman v. Spain, 135 So. 2d 195 (1961) convinces us that a choice is necessary to decision here. The state standard employed there is summarized in the following excerpts from the Court's opinion:

> "By the use of metaphysical learning, *speculation and conjecture,* one may reach several posible conclusions as to how the accident occurred. However, such conclusions could only be classed as possibilities; and this Court has many times held that verdicts cannot be based on possibilities. *Id.* at 197. (Emphasis added.)

We apprehend a vital difference between this standard and that announced by the Supreme Court of the United States in Lavender v. Kurn, 327 U.S. 645 (1946), (explored fully hereinafter) as applied to the facts of the case before us.

Supreme Court of South Carolina which, in state court, would have made the trial judge the trier of fact on the question whether Byrd was covered by workmen's compensation. The Court refused to permit state law to divest a federal jury of its normal function. In the course of the opinion, it said:

> "Thus, the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.
>
> "We think that in the circumstances of this case the federal court should not follow the state rule. *It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts. Byrd, supra,* at 538." (Emphasis added.)

To permit state law to dictate when a federal trial judge must take questions of fact from a jury by means of a directed verdict or a judgment n.o.v. seems hardly less disruptive of the federal judge-jury relationship than assigning the task of resolving factual disputes to the trial judge initially.

The question posed in *Simler,* another diversity case, was whether federal or state law would determine if a controversy was equitable in nature and triable to the court, or legal and triable to a jury. The Court said:

> "The right to a jury trial in the federal courts is to be determine as a matter of federal law in diversity as well as other actions. . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." *Id.* at 222.

If the seventh amendment requires uniformity in the exercise of the jury trial right in the federal courts, surely that subsumes uniformity in the exercise of the power to direct a verdict or grant a judgment n.o.v.

In any event, this court's position on the question is clear. In *Revlon, Inc.* v. *Buchanan,* 271 F.2d 795 (5 Cir. 1959), example, we said:

> "The quantity and quality of proof necessary to make out a case for submission to the jury in federal court are determined by the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure and the decisions of the courts of the United States. *Id.* at 800." [2]

Careful examination of the principles involved has given us no cause to doubt the correctness of that position. We adhere to it.

## II.

One further preliminary issue remains. Appellant contends that in formulating the federal standard to be applied in determining whether the evidence in a case is sufficient to raise a question for the jury, consideration must be given to the decision in *Lavender* v. *Kurn,* 327 U.S. 645 (1946), in which the Supreme Court circumscribed the power of federal judges to dispense with a jury in resolving disputed questions of fact.

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[2] *Accord,* Prudential Ins. Co. v. Schreffler, .... F.2d.... (5 Cir. 1967); ABC-Paramount Records, Inc. v. Topps Record Distributing Co., Inc., .... F.2d .... (5 Cir. 1967); Melton v. Greyhound Corp., 354 F. 2d 970 (5 Cir. 1965); Shirley [sic] v. Louisville & N. R.R., 327 F.2d 549, 552 (5 Cir. 1964); Kirby Lumber Corp. v. White, 288 F.2d 566 (5 Cir. 1961); Rutherford v. Illinois Cent. R.R., 276 F.2d 330, 333, 340-41 (5 Cir. 1960); Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575, 582 (5 Cir. 1957); Reuter v. Eastern Airlines, 226 F.2d 443, 445 (5 Cir. 1955).

A. *Lavender* was an action commenced under the Federal Employers Liability Act to recover damages for the death of Haney, a switchtender employed by the Illinois Central Railroad Company. Haney was found unconscious on the ground north of the railroad track, near his switch. He had been struck in the back of the head, causing a fractured skull from which he died. Lavender, the administrator of Haney's estate, brought suit against the Illinois Central and the trustees of the St. Louis-San Francisco Railway Company (Frisco). The theory asserted by the plaintiff was that Haney had been struck by the curled end or top of a mail hook extended from the outside of the mail car of a Frisco train which was backing into the station at the time along the track near which Haney was found. There were no eyewitnesses to the occurrence. It was not shown that the hook was in fact extended at the time and place of Haney's injury, and it was demonstrated that, except for a topographic elevation at one place along the track, for a topographic elevation at one place along the track, the hook, even if extended, was too high to have struck Haney discovered appeared to contradict plaintiff's theory of causation. The defense contended, first, that plaintiff's theory was practically a physical impossibility, and second, that Haney was probably murdered. Haney's wallet, containing no money, was found six days after and about a block from the place of the injury. The examining doctor who testified that the fatal blow might have come from an object attached to a moving train also admitted that the fracture might have resulted from a blow from a pipe or club wielded by an individual. It appeared that many hoboes and tramps frequented the area at night in order to get rides on freight trains, and it was shown that Haney carried a pistol to protect himself, which was found loose under his body by those who discovered him. The jury returned a verdict for the plaintiff, which was overturned by the Supreme Court of Missouri on appeal. On writ of certiorari, the Supreme Court of the United States reversed, holding

that the case was properly submitted to the jury, and that it could reasonably be inferred from the plaintiff's evidence that death was caused by the mail hook.[3]

In its opinion, the Court elaborated thus upon the standard to be employed in determining whether the evidence in a case raises a question for the jury:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney . . . *It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Id.* at 652-53. (Emphasis added.)

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[3] Such a holding was necessary to sustain the verdict against Frisco. Haney's employer, the Illinois Central, could have been held liable even assuming that Haney was the victim of an asault, for failure to provide him a safe place to work. But the sole basis of the action against Frisco, the operator of the train, was its asserted negligence in permitting the mail hook to strike Haney.

We find it impossible to reconcile this rule with the language employed by the Court in *Pennsylvania R.R.* v. *Chamberlin,* 288 U.S. 333 (1932), and relied upon by the district court in this case:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of those inferences as against the other, before he is entitled to recover." *Id.* at 339.[4]

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[4] In Chamberlin, plaintiff asserted that her husband's death was caused by a collision between two strings of railroad cars. Plaintiff's only witness to the event testified that he saw both strings of cars pass his station with the deceased standing on the rear of the lead string, and that after he looked away, he heard a loud crash, turned around shortly thereafter, and saw the two strings together, and the deceased no longer in sight. Plaintiff relied solely upon this testimony for proof that the alleged collision occurred.

It was uncontroverted that plaintiff's witness was in an extremely poor position to see whether the two strings were actually in contact. The cars were some 800 to 900 feet away, moving almost directly away from him (his angle of vision was a mere 3°33′—the optimum being, of course, 90°), and it was near dusk of a misty evening. Three employees who were riding the second string testified positively that no collision between the two strings of cars occurred. Every other employee in a position to see corroborated their testimony. Plaintiff's witness did not, of course, testified positively that the crash he heard was due to a collision between the two strings in question. Instead he testified that he heard a loud crash, (which did not cause him to turn immediately, because loud noises were commonplace in the switching yard), and that when he turned shortly thereafter, the two strings of cars appeared to him to be moving together with the deceased no longer in sight. From these observations, he inferred that the collision had taken place. Thus viewed, we think that the ratio decidendi of Chamberlin is contained not in the above quoted passage dealing

The consequence of heeding the teachings of *Lavender* was well expressed, we think, by Judge Holtzoff in *Preston* v. *Safeway Stores*, 163 F. Supp. 749 (D.D.C. 1958):

> "The conclusion seems inescapable that the decision in *Lavender* v. *Kurn* must be deemed to constitute an abandonment of the earlier doctrine that if the evidence is capable of either of two inferences, it cannot be deemed to support either. The case substitutes the principle that in such an event, it is for the jury to determine which inference to deduce and that the jury has a right to draw either one. The prior cases . . . [such as Chamberlin] must be deemed to have been overruled sub silentio." *Id.* at 752-53.

We are persuaded that this view is correct. If proven facts do give support to the inference necessary to sustain a plaintiff's case, then, under the rule of *Lavender*, it is immaterial that they give equal support to a contrary inference. It is only when there is a *complete absence* of probative facts to support the conclusion reached that the jury's judgment may be ignored.

B. It has been suggested that *Lavender* and cases like it, arising under the Federal Employers Liability Act, are

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with inconsistent inferences *equally supported* by the evidence, but rather in the following statement:

> "[T]he desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist." *Id.* at 340.

Whether this principle is affected by the decision in Lavender v. Kurn, we need not determine. The point material to our decision here is that, viewed in this light, the oftquoted shibboleth attributed to Chamberlin—that if evidence equally supports two inconsistent inferences, the jury cannot choose either—appears to be dictum.

sui generis, and ought therefore to be ignored in fashioning a general rule for testing the sufficiency of evidence to raise a question for the jury.[5] We are unable to agree with this proposition.

It is true, as the Court pointed out in *Rogers* v. *Missouri Pacific R.R.*, 352 U.S. 500 (1957), that an action under FELA is a "statutory negligence action . . . significantly different from the ordinary common law negligence action." *Id.* at 509-10. But we think the difference lies in the change in the standard of liability wrought by the Act—(from the common law concepts of proximate causation to whether the employer's negligence played *any part*, however small, in the injury complained of)—and not in any alteration of the jury's historic function.

The argument that the tests employed by the Supreme Court to determine the existence of a jury question vel non in FELA cases can be discounted on the ground that the Court is merely complying with a special congressional mandate to broaden the jury's powers in such cases is put to rest by the following passage from a footnote to the Court's opinion in the *Rogers* case:

> "The inclusion in . . . [the 1908 revision of the Federal Employers Liability Act] of . . . [a] provision, 'All questions of fact relating to negligence shall be for the jury to determine,' was proposed but not adopted. *The view prevailed that this would be surplusage in light of the Seventh Amendment embodying the common-law tradition that fact questions were for the jury.*" *Rogers* v. *Missouri Pacific R.R., supra,* at 508, n. 18. (Emphasis added.)

We are unwilling to assume that the Supreme Court, absent a statutory command, would undertake to rewrite

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[5] Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 656 (1 Cir. 1961); Note Rule 50(b); Judgment Notwithstanding the Verdict, 58 Colum. L. Rev. 517, 523 (1958).

the role to be filled by the jury in any class of actions. In our view, FELA cases are distinguishable not because a lesser quality of evidence of fault will suffice to provide a basis for a jury's verdict, but rather because evidence of a lesser degree of fault will entitle the employee to recover.

It is the seventh amendment which governs the role of the jury in the courts of the United States, and we perceive no rational basis for the proposition that it means one thing in FELA cases and quite another in other actions.[6] That the Supreme Court shares this view is indicated, we think, in the following excerpt from *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962):

> "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. *As in cases under the Jones Act . . . and under the Federal Employers Liability Act . . . trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment, noted above, are brought into play.* . . . As we recently stated in another diversity case, *it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'" Id.* at 361 (Emphasis added.)

On this analysis, we are satisfied that the principles delimiting the power of judges to grant judgment notwithstanding a jury's verdict announced by the Court in *Lavender v. Kurn* are fully applicable to the case before us.[7]

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[6] See Gibson v. Phillips Petroleum Co., 352 U.S. 874 (1956), *reversing* 232 F.2d 13 (5 Cir. 1956); Swafford v. Atlantic Coast Line R.R., 350 U.S. 807 (1955), *reversing* 220 F.2d 901 (5 Cir. 1955); Williams v. Carolina Life Ins. Co., 348 U.S. 802 (1954, *reversing* 210 F.2d 477 (5 Cir. 1954).

[7] See generally Bagalay, *Directed Verdicts and the Right to Trial by Jury in the Federal Courts*, 42 Tex. L.Rev. 1053 (1964).

## III.

Having concluded that a uniform federal standard, materially influenced by the principles announced in *Lavender v. Kurn* and like cases, governs the determination of the sufficiency of the evidence to present a question for the jury in diversity cases, we turn now to an examination of the evidence presented in this case, and the bases upon which the trial court found that evidence insufficient to support the verdict which the jury rendered for the plaintiff. Of course, we deal here only with those portions of the evidence (and the inferences which the jury might draw therefrom) which lend support to plaintiff's theory. This follows necessarily from the principle that "the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions," unless there is a complete absence of probative facts to support that conclusion. *Lavender v. Kurn, supra,* at 653.

The damage structure was a large beanhouse, erected by Muscogee Iron Works in 1951 and used by Planters for the storage of soybeans from that time until the occurrence of the event in question here on November 29, 1962. The basic design of the building and the technique employed in its loading, both of significance to the plaintiff's contentions, are described in the margin.[8]

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[8] The beanhouse was approximately 340 feet long by ninety feet wide, with vertical sidewalls thirteen feet high. The roof sloped up from the sides and ends of the building at an angle of forty-five degrees and was topped by a narrow structure called the monitor, which ran the length of the ridgeline. The monitor was ten feet high, and the peak height of the beanhouse, including the monitor, was sixty-three feet. The principle load-carrying members were steel trusses bolted to a concrete foundation at twenty foot intervals. On these trusses were fastened corrugated steel sheets, inside and outside, to form double side walls. The roof consisted of corrugated steel sheets and there were not partitions in the interior. The floor was a concrete slab.

The loading process began by dumping truck loads of beans into a pit some ninety feet from the south end of the beanhouse. Auger-

The theory advanced by appellant was that a cloud of explosive bean dust near the roof in the center of the building, relatively small in comparison to the total volume of air space in the structure was ignited by a spark produced when a piece of "tramp" metal or rock falling from the overhead conveyor struck a spout baffle, resulting in an explosion which caused a momentary uplift of the roof and consequent damage to the structural members of the building when the roof settled.

The evidence adducted by appellant in support of this theory consisted of (1) the testimony of several of its employees who were in the vicinity of the beanhouse at the time of the event regarding their sensory impressions of the occurrence, (2) evidence pertaining to the position and characteristics of the remains of the structure, (3) the testimony of a chemist with respect to the results of his microscopic examination of dust samples taken from the damaged and undamaged sections of the building, (4) the opinion testimony of an expert witness regarding the cause

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type conveyors moved the beans from the pit to the base of an elevator where the beans were lifted up to a belt conveyor on a trestle about fifty feet above the ground, and there carried a distance of approximately 90 feet into the south end of the monitor where the belt conveyor dumped the beans into a U-shaped trough about eighteen inches deep, extending the length of the monitor and containing a screw conveyor used to move the beans northward through the monitor. Controllable spouts in the bottom of the trough permitted the incoming beans to be dumped into piles on the concrete floor of the beanhouse approximately fifty-three feet below. As beans dropped on the floor below, they formed conical piles which gradually expanded toward the side walls. Filling with respect to any particular pile was continued until the conical slope on either side of the peak of the pile had reached the desired height; then a new pile would be begun and the process continued until the building was filled. When beans were being dropped into the house from the overhead conveyor, as was the situation at the time of occurrence here in question, the atmosphere inside the house was extremely dusty and workmen inside wore dust masks. Beans were not screened before being fed into the house and some trash, including "tramp" metal and rocks went in with the beans.

of the collapse, and (5) evidence of extra-judicial statements made by an employee of the defendant, offered as an admission that the collapse was caused by an explosion.

A. The testimony of the employees in the vicinity of the beanhouse at the time of the occurrence was summarized by the trial court as follows:

> "The lay witnesses, i.e., the eight employees, were on the grounds at the time of the collapse of the beanhouse. Three were remotely placed, one of whom saw and heard nothing until the incident was over and two of whom saw nothing at the time but heard a noise. One of these described the noise as a loud report like an explosion and the other said that it sounded like a cannon firing. The remaining five witnesses were in the vicinity of the beanhouse and they variously described the noise as being similar to a sonic boom, to the coupling of two boxcars and to dynamite when being used for blasting stumps. One of them said it was an 'awful noise' and another described it as a 'tremendous noise.'
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> "Of these five witnesses who were in a position to see, one saw dust billowing in the air and saw the building sudder. Another saw a ring of dust or smoke and a piece of sheet metal and other debris rising in the air. Two men who were on the bean dump near the south end of the building saw the south wall swell outward and a piece of sheet metal come off the south end of the monitor before they were engulfed in a cloud of bean dust.
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> "The fifth witness was inside the beanhouse checking the temperature of the beans. He and another employee of plaintiff (who was not called to testify) were standing on the bean pile about twenty feet from the south end of the building. A repetitive noise 'like a rock or something going in the conveyor (the over-

head auger)' attracted his attention to the south end of the building at the monitor area. There he saw a quick flash like a match being lit and then quickly blown out, and at that point, 'it got dusty.' The substance of his testimony in this last respect is that, while it was always dusty when beans were being dropped into the beanhouse, the dust content of the atmosphere drastically increased after he saw the match-like flash of fire, so that it was almost impossible to see. Because of the dust, he and his companion could see only one way to escape, and that was through the new hole which had opened where the conveyor entered the beanhouse. They climbed up and out, and reached the ground by climbing down the elevator. The witness was very frightened and he attributed this to the 'awful noise' that he heard. Neither man was injured, and the witness was unaware of having experienced any pressure or burning while inside the beanhouse, nor did he smell any unusual odors. He was unaware that the building had partially collapsed until after he was outside."

In addition to the observations summarized above, one of the witnesses, who stated that he was standing facing the building some ninety feet away when the noise generated by the event attracted his attention, testified that the "whole top [of the beanhouse] raised up." Reference to the outline of plaintiff's theory sketched above shows the critical importance of this testimony. Another witness testified that he noticed a distinct "burnt odor" in the vicinity after the occurrence.

Damage to the beanhouse was concentrated near the center of the structure. There, the sidewalls had fallen outward, allowing beans to flow out onto the ground, and the monitor had sagged down with the roof, which in places rested on the bean pile. Some windows and ventilators were broken. The northern third of the building was virtually unharmed. The south end had leaned inward and had pulled

away from the bridge supporting the conveyor between the elevator and the beanhouse.

One of appellant's expert witnesses, a licensed mechanical engineer, testified on the basis of his inspection of the remains of the structure, that the monitor section and conveyor had settled down approximately on the center line of the building, and had not shifted appreciably to either side.

Photographic exhibits were introduced in support of this testimony. The witness then indicated that, in his opinion, failure of a structural member resulting from excessive pressure against the sidewalls due to overloading (the explanation of the collapse offered by defendant) would quite probably have pulled the structure to one side or the other.

Plaintiff's evidence also included the testimony of a chemist who conducted microscopic examinations of two samples of bean dust, one from the damaged portion of the beanhouse and the other from the undamaged northern section, for the purpose of ascertaining the presence of carbon in the dust samples. The sample from the damaged section was shown to have contained carbon particles amounting to two percent by weight, while no carbon particles were detected in the other sample. The witness testified that carbon is normally the product of combustion, and that a dust explosion is a form of combustion, and that a dust explosion is a form of combustion.

B. The trial court's evaluation of these first three categories of evidence was premised upon the supposed rule [9] of *Chamberlin,* that where proven facts give equal support to each of two inconsistent inferences, the jury cannot be permitted to draw either because its selection could be based on nothing more than conjecture. In its opinion, the trial court stated:

> "The testimony of the eight employees is at best equivocal insofar as it is relied upon to prove an

[9] See note 4, supra.

explosion. In sum, they testified to hearing certain sounds and seeing certain events which are all consistent both with plaintiff's theory of an explosion and the defendant's theory of structural failure. . . . Their testimony and the inferences to be drawn from it are equally consistent with both theories and probative on neither. . . .

"The evidence which describes the position and characteristics of the remains of the structure after the event falls in the same category. . . . The same may be said of the testimony of the chemist who found carbon in one of two dust samples. . . . Carbon itself is a basic element and the presence of varied kinds of foreign matter in the beans makes the presence of one more kind equivocal on the present issue." [10]

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[10] In addition to Chamberlin, the trial court relied upon Ralston Purina Co. v. Edmunds, 241 F.2d 164 (4 Cir. 1957). We think that case distinguishable.

The plaintiffs there were turkey breeders who claimed that a turkey malady which hampered their breeding operations was caused by a change in the feed manufactured by defendant, of which they were not forwarned. Plaintiff's introduced evidence that there had been an unannounced change in the feed pellets, and that their turkeys had been stricken shortly after the time of the change. Then they asked each of several expert witnesses to state whether in his opinion, assuming that all other conditions were satisfactory and that there was no evidence of disease or adverse lighting conditions (other possible causes which were in fact revealed by plaintiff's witnesses), the change caused the malady. The predictably affirmative answers to this syllogistic hypothetical question constituted the best evidence offered by plaintiffs to support the inference that the change in the feed did cause the damage complained of. Further, and of manifest importance to the court, plaintiffs introduced no evidence to negate the other possible causes strongly suggested by the testimony of their own witnesses. In holding this evidence insufficient to present a question for the jury, the court said:

"We are not inadvertent to the salutary doctrine repeated in recent Supreme Court decisions . . . that where the evi-

We think that the Supreme Court has eschewed this approach. As we read *Lavender,* it is immaterial that evidence may equally support an inconsistent inference, if in fact fairminded men might draw from that evidence the inference sought by the party against whom a preemptory instruction is sought. In such a case, it is the quintessential function of the jury to "settle the dispute by choosing what seems to them to be the most reasonable inference." *Lavender, supra,* at 653. See *Tennant* v. *Peoria & P.V. Ry.,* 321 U.S. 29, 35 (1944). The question, then, is whether this evidence, together with any other supporting the plaintiff's position, constitutes a basis from which the

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dence supports conflicting inferences, the question is for the jury. We think, however, that these cases are distinguishable, for there is a lack here of substantial evidence to support the inference on which the plaintiffs rely. See also Kyle v. Swift & Co., 4 Cir., 229 F.2d 887, where the [testimony of] plaintiff's experts eliminated other possible causes, the opposite of the situation here." *Id.* at 170.

A question more comparable to that dealt with in Ralston Purina would have been presented here had appellant's evidence consisted of nothing more than testimony that bean dust of explosive capabilities was present in the building, a showing that the beanhouse had collapsed, and the opinion of an expert witness, predicated on an *unsupported* hypthesis that the building was not overloaded, that a beandust explosion caused the collapse. On such a record, the reasoning employed in that opinion would be strongly persuasive. But the evidence in fact adduced by appellant in this case differs appreciably and, we think, decisively. The inference upon which appellant relies here is supported, inter alia, by testimony that the claimed explosion sounded like an explosion, loosed a billowing cloud of dust or smoke, caused sheet metal and other debris to rise in the air, lifted the roof of the building, and left in its wake an odor of burning. It is further strengthened by positive testimony that the beanhouse was loaded only to the eave line, as it was designed to be—testimony which, if believed by the jury, would thoroughly discredit the explanation offered by the defendant, that the collapse resulted from a structural failure caused by overloading. The presence of this evidence in the record compels us to conclude that Ralston Purina v. Edmunds is not apposite to the case before us.

jury might with reason have inferred that an explosion did occur, and it is no answer to that question to say that a conflicting inference might with equal probability have been drawn therefrom.

Viewed in this light, we think that the evidence, dismissed as "equivocal," cannot be so lightly disregarded. As the trial court noted, "There were no carefully placed instruments to sense and record heat, pressure and light phenomena so as to more or less conclusively demonstrate whether an explosion had occurred. Instead, plaintiff had to rely on evidence of the attendant circumstances and the results from which ultimate fact might be inferred."

One of those results from which the ultimate fact might be inferred was the sound produced by the occurrence. That sound was variously described by witnesses as "a loud report like an explosion," "the sound of a cannon or five-inch naval gun being fired," "dynamite blasting stumps," and "a jet aircraft breaking the sound barrier." Bearing in mind the necessity for plaintiff's reliance upon inferences, we cannot say that this testimony is incapable of supporting a rational inference favorable to plaintiff in the minds of fairminded jurors. Moreover, we do not share the views of the trial court in concluding that the testimony regarding the visual observations of the employees is "all consistent both with plaintiff's theory of an explosion and defendant's theory of structural failure." This conclusion fails, we think, to take into account the observations of the witnesses who testified that the roof of the beanhouse was raised momentarily by the occurrence, and that a definite odor of burning existed in the vicinity immediately thereafter. While this testimony is patently consistent with plaintiff's theory of an explosion, it is somewhat difficult to reconcile with defendant's theory of structural failure.

We are likewise unable to agree that the evidence concerning the position of the remains is "probative of noth-

ing." There was evidence that the roof and monitory structure did not shift appreciably to either side during the collapse. Appellant's expert witnesses expressed an opinion that had the collapse resulted from structural failure precipitated by overloading, the roof and monitor would in all probability have been pulled toward the side where the failure occurred, except in the unlikely event of simultaneous and equal failure on both sides. The question, once again, is whether fairminded jurors might draw from this evidence the inference sought by the plaintiff—not whether, in the minds of judges, the evidence might as easily be harmonized with the defendant's theory. Clearly, we think, an affirmative answer is required.

Although we think the question a closer one, we reach a like conclusion with regard to the evidence of the presence of carbon in a dust sample taken from the building after the collapse. Plaintiff's chemist testified that a bean dust explosion is a form of combustion, that carbon is normally produced by combustion, and that microscopic examination revealed particles of carbon in a dust sample taken from the damaged section of the beanhouse, while a similar sample taken from the undamaged north end of the structure was found to be free of carbon. The inference suggested by the plaintiff was, of course, that the carbon particles found were produced by the claimed explosion.

Defendant's chemist testified that his analysis of companion samples revealed only a few bits of partially burned Kleenex in the sample taken from the damaged part of the building, which, in his opinion, had no bearing on a dust explosion. But the jury might have experienced some difficulty in reconciling that testimony with the following inscription placed on the container of that sample (which was introduced in evidence) by the defendant's investigating agent MacCarmack: "Dust from between rod latticed catwalk in bottom of collapsed monitor taken from end of rods between inside angle at walk. Note carbon scale de-

posits and smutty dust. Exhibit A. 12/4/62. E.L. MacC."

That carbon was found in the one sample where plaintiff's theory would lead one to expect its presence and was not found in the other could be, of course, purely fortuitous. But we do not think that the jury was required to regard it so, in the circumstances present here.

C. The principal basis for the trial court's grant of defendant's motion for judgment notwithstanding the jury's verdict was its conclusion that the explosion theory postulated by plaintiff is in irreconcilable conflict with an established principle of physical law. We find no such clear and unambiguous proof of any law of physics that permits this disposition of the case, however unlikely is the plaintiff's explanation of the occurrence.

The parties agree that the presence of three factors or conditions is essential to the occurrence of a bean dust explosion. There must be (1) a combustible mixture of bean dust and air and (2) a source of ignition, and (3) the forces generated by the combustion must be adequately confined or contained. Concerning the first two of these, the trial court said:

> "Viewing the evidence most favorably for plaintiff, it must be taken as established that the soybean dust in the beanhouse, if suspended in the atmosphere in correct proportions, would provide an explosive mixture. And, evidence of a spark inside the building given by one witness who was there when the incident occurred would support a finding of a source of ignition. The verdict is on sound ground as to those two points."

We agree with that evaluation.

On the question of containment, however, the trial court took a different view. It concluded that no evidence of any adequate containment was introduced, and it regarded this deficiency as conclusive against the plaintiff's claim. We

think that the court erred in assuming from the evidence before it that the building itself could not have provided the necessary containment for an explosion which damaged only two-thirds of the structure.

The fundamental principle of containment is not difficult to grasp. The heat generated by the burning of a potentially explosive mix causes the surrounding gases to expand rapidly. If the gases are confined or contained in some fashion, the resulting increase of pressure against the surfaces of the container may produce an explosion. If there is no efficient container, then, through the processes of convection and conduction, the explosive potential is dissipated. Plaintiff's theory, as we have noted, is that the collapse which occurred here was triggered by the ignition of a relatively small cloud of explosive bean dust suspended in the air space between the roof and the beans near the center of the building, which caused an uplift of the roof that precipitated the structural damage. The only "container" available to plaintiff under this theory is the beanhouse itself. Analyzing this theory, the trial court said:

> " . . . . Returning to the relative concept of containment, it is clear that if the volume of explosive dust had been large enough, the beanhouse itself could serve as the explosion chamber, but if the dust were not that extensive its ignition would generate, at most, only a flash fire, incapable of explosively causing structural damage—the pressure and heat increases would dissipate their energy at some point between the outer limits of the dust and the interior surfaces of the beanhouse . . . . Plaintiff's expert on this matter, the engineer, testified that the explosion did not involve the whole building but instead occurred in only a small area near its center. It was his opinion that if the whole building had been involved it would have been totally destroyed. If, as plaintiff's case requires, a small explosion exerting pressure on a localized part

of the beanhouse is at least sufficient to cause the failure of that part of the structure, the conclusion is inescapable that this witness was correct in the last stated opinion, for an explosion involving the whole building of containment would undoubtedly exert proportionately magnified pressures on all interior surfaces, with correspondingly greater effect."

These statements indicate clearly that the court simply concluded that since the whole building was not blown apart, the damage which did occur could not possibly have been caused by an explosion of the sort claimed by the plaintiff.

Forearmed with this conclusion, the court then relied upon the responses of plaintiff's expert, the engineer, to four questions on cross examination which superficially make it appear that in expressing an opinion that an explosion did occur, the witness wholly failed to give consideration to the requirement of containment:

"Q. And this cloud of dust was out in the open?

A. Yes.

Q. It was not confined or contained in any fashion.?

A. We assume not, no.

"Discussing the analogy of a gas stove leaking gas, but leaking enough to cause only a puff instead of an explosion when ignited, the witness explained that this resulted from the relationship between the amount of vapor and the area which it occupied. His cross-examination continued, as follows:

"Q. In other words, you had no containment in a large area, is that right?

A. That's right.

Q. And the explosion you are talking about is an explosion involving no containment in a large area, isn't it, Mr. . . . . ?

A. Yes.

> "In one breath the witness correctly explains the reason for the lack of explosion in the gas stove analogy, and in the next he agrees that the same circumstances apply to the explosion which he claims occurred in the beanhouse. In short, his opinion is in direct conflict with established physical laws, just as are the inferences plaintiff seeks to draw from the remainder of the evidence. . . ."

On the strength of these responses, the court concluded that the witness' opinion was in direct conflict with an established physical law, and thus devoid of probative value. The following excerpts from other portions of the witness' testimony suffice to demonstrate that he was in fact aware of and taking into account the necessity for containment in formulating his opinion as to what caused the collapse:

> "A. . . . In an explosion of this type the action involved is not so much the pressure that the explosion builds up but the rate at which it builds up and the way in which it forces the air away from it. Now, it is a kinetic action. It is not just a question of building up a pressure within a whole area of the building. If these men were down a way, they might have been completely shielded from the action. . . . In my opinion that is why a comparatively, we will say a comparatively small explosion in a building of this type, as compared to the total volume of the building, could possibly generate a sufficient amount of energy against the walls and the roof to have caused an uplift."

The real conflict appears to be not between the witness' opinion and any physical law established in the record, but rather between the different meanings ascribed by the witness and the court to the notion that containment is relative. The witness—an expert trained in engineering—was clearly of the opinion that it meant that an explosion could occur without accompanying total destruction of the

beanhouse, while the trial court was just as clearly of the view that any explosion which utilized the building itself for confinement would doubtless result in total destruction of the structure. We think that the jury had the right to resolve that conflict in favor of the view expressed by the expert witness, for we find no adequate basis in the record to sustain the position taken by the trial court that the explosion postulated by the plaintiff's witness was literally a physical impossibility.

## IV.

In the alternative to its motion for judgment n.o.v., the defendant moved for a new trial, which was granted conditionally. Our review of the latter grant stands upon a footing entirely different from our review of a judgment n.o.v. A district judge may, in the exercise of his discretion, grant a new trial for reasons which would not support the award of a judgment notwithstanding a verdict. *Hampton* v. *Magnolia Towing Co.*, 338 F. 2d 303, 306 (5 Cir., 1964). Here, the trial court determined that the jury's verdict was contrary to the overwhelming weight of evidence. Appellant's do not challenge this ruling, nor could they successfully do so. We find no error in it.

The judgment is REVERSED, and the cause is REMANDED for a new trial.

UNITED STATES DISTRICT COURT
N. D. MISSISSIPPI,
DELTA DIVISION.

AUG. 18, 1965.

No. DC6328.

PLANTERS MANUFACTURING COMPANY, *Plaintiff*,

v.

PROTECTION MUTUAL INSURANCE COMPANY, *Defendant*.

CLAYTON, District Judge.

This action was brought by Planters Manufacturing Company, a Mississippi corporation, against its non-resident insurer, Protection Mutual Insurance Company, to recover on an insurance policy issued by the defendant on the buildings of plaintiff's soybean and cottonseed processing plant in Clarksdale, Mississippi. Jurisdiction rests on diversity of citizenship, and trial was to the court and jury. The policy, which was not in dispute, protected against losses arising from explosions, as well as other risks, and the one issue on liability was whether plaintiff's bean storage house had been partially destroyed by an explosion as plaintiff contended. The amount of damage (more than $193,000) was not seriously disputed. Defendant denied that an explosion had occurred and sought to demonstrate that the beanhouse collapsed as a result of structural failure brought on by overloading, an uninsured risk. At the conclusion of a five day trial, defendant moved for a directed verdict in its favor, which was refused, and the jury returned a verdict for plaintiff. Defendant filed a timely motion for judgment in accordance with its motion for a directed verdict or, in the alternative, for a new trial, pursuant to Rule 50, Federal Rules of Civil Procedure. Briefs were submitted and in addition the court later heard oral argument on this motion, which is now for disposition.

The structure with which this action is concerned was used by plaintiff for the receipt and storage of soybeans prior to processing. The beanhouse was approximately 340 feet long by ninety feet wide, with vertical side walls thirteen feet high. The roof, sloping up from the sides at a forty-five degree angle, was topped by a narrow structure on the ridgeline which ran the length of the building. This structure, called the monitor, was ten feet high and the peak height of the beanhouse, including the monitor, was sixty-three feet. The principal load-carrying members were steel trusses bolted to a concrete foundation at twenty foot intervals. On these trusses were fastened corrugated steel sheets, inside and outside, to form double side walls. The roof consisted of corrugated steel sheets and there were no partitions in the interior. The floor was a concrete slab.

Loading of the beanhouse was accomplished by dumping truck loads of beans into a pit near the south end of the building. Auger-type conveyors, on the Archimedes screw principle, transported beans from the pit to the base of an elevator which was about ninety feet south of the beanhouse. The elevator discharged the beans at the top onto a belt conveyor which carried them into the beanhouse at monitor level and, once inside, transferred them into a U-shaped trough eighteen inches deep. The trough, or conveyor box, extended the length of the monitor and had controlable spouts in its bottom at five foot intervals. A sixteen inch auger-type conveyor lay in the bottom of the conveyor box and moved the incoming beans from south to north. Selective piling of the beans on the floor of the beanhouse was achieved by opening the desired spout.

Removal of the beans as they were needed was done with an auger-type conveyor in a tunnel under the bean pile. When beans were required, gates in the tunnel were opened and the auger-conveyor activated to carry the beans away.

The loading technique is significant for two reasons. First, plaintiff's theory is that the dropping of soybeans from the overhead conveyor produced a very dusty atmosphere which at the time of the alleged explosion reached a critical ratio of dust to air capable of serving as an explosive. Second, foreign matter was commonly introduced into the system when the bulk beans were dumped into the outside pit, and plaintiff contends that a piece of "tramp" metal or rock passed through the overhead auger, fell through the open spout and, striking a spout baffle under the monitor, produced a spark which ignited the cloud of bean dust and caused an explosion.

To prove that such an explosion had occurred, plaintiff called eight of its employees and two expert witnesses to testify. There was also evidence with respect to other issues, but it is only with the testimony which tended to show that an explosion occurred that the court is now concerned.

The lay witnesses, i.e., the eight employees, were on the grounds at the time of the collapse of the beanhouse. Three were remotely placed, one of whom saw and heard nothing until the incident was over and two of whom saw nothing at the time but heard a noise. One of these described the noise as a loud report like an explosion and the other said that it sounded like a cannon firing. The remaining five witnesses were in the vicinity of the beanhouse and they variously described the noise as being similar to a sonic boom, to the coupling of two boxcars and to dynamite when being used for blasting stumps. One of them said it was an "awful noise" and another described it as a "tremendous noise."

Of these five witnesses who were in a position to see, one saw dust billowing in the air and saw the building shudder. Another saw a ring of dust or smoke and a piece of sheet metal and other debris rising in the air. Two men who were at the bean dump near the south end of the

building saw the south wall swell outward and a piece of sheet metal [1] came off the south end of the monitor before they were engulfed in a cloud of bean dust.

The fifth witness was inside the beanhouse checking the temperature of the beans. He and another employee of plaintiff (who was not called to testify) were standing on the bean pile about twenty feet from the south end of the building. A repetitive noise "like a rock or something going in the conveyor (the overhead auger)" attracted his attention to the south end of the building at the monitor area. There he saw a quick flash like a match being lit and then quickly blown out, and at that point, "it got dusty." The substance of his testimony in this last respect is that, while it was always dusty when beans were being dropped into the beanhouse, the dust content of the atmosphere drastically increased after he saw the match-like flash of fire, so that it was almost impossible to see. Because of the dust, he and his companion could see only one way to escape, and that was through a new hole which had opened up where the conveyor entered the beanhouse. They climbed up and out, and reached the ground by climbing down the elevator. The witness was very frightened and he attributed this to the "awful noise" that he heard. Neither man was injured; and the witness was unaware of having experienced any pressure or burning while inside the beanhouse, nor did he smell any unusual odors. He was unaware that the building had partially collapsed until after he was outside.

Approximately two-thirds of the beanhouse was damaged, as is indicated by the fact that in repairing the damage the northern 120 foot section was preserved and the southern 220 foot section was replaced. The south end had leaned inward and had pulled away from the bridge which supported the conveyor between the elevator and the beanhouse. Otherwise it was relatively unharmed except for a piece

[1] These witnesses called these objects "tin."

of sheet metal which was missing from the south end of the monitor. More severe damage occurred near the center of the beanhouse. The sidewalls had fallen outward, allowing beans to flow out onto the ground, and near the center of the building the monitor had sagged down with the roof, which in places rested on the remainder of the bean pile. Some windows and ventilators were broken.

The first expert witness whose testimony is relevant to the issue here was a chemist who had been given two samples of bean dust taken from this building for analysis. In one of these he found a certain amount of carbon. His testimony did not reveal any other characteristic of the samples which might be termed unusual.

The second expert was a mechanical and electrical engineer who was a partner in a firm devoted to analyzing industrial accidents and appraising losses. This witness had examined the remains of the beanhouse and on the basis of this examination, the statements of eye witnesses, and the testimony of the witnesses who preceded him at the trial, which he heard, he gave as his opinion that a bean dust explosion had caused the damage to the beanhouse.

In addition to the foregoing, two of plaintiff's employees testified to actions and statements of an employee of the defendant who was at the scene during the salvage operations. These witnesses stated that this individual arrived the day after the collapse of the beanhouse and remained on the scene for approximately one week, during which time he examined the wreckage. He took dust samples and sent them away for analysis, and the witnesses testified that he reported to them that the analysis showed that the dust had explosive capabilities. They also testified that he said that he had sent a telegram or telegrams to the defendant in which he expressed the opinion that the collapse of the building had been caused by an explosion, and that he had expressed the opinion that a bean dust explosion had occurred in the monitor area which had triggered the collapse

of the building. His version, given by deposition, is in sharp conflict with the pertinent parts of this evidence.

A motion for judgment in accordance with a motion for a directed verdict is governed by the same principles as the earlier motion. Wieloch v. Rogers Cartage Co., 290 F. 2d 235 (7th Cir. 1961); 2B Barron & Holtzoff, Federal Practice & Procedure § 1075 (Wright Ed. 1961). The evidence must be viewed most favorably for the party against whom the motion is made, Hover v. MacDonald Engineering Co., 183 F. Supp. 427 (S.D. Iowa 1960) and when so construed, if it can be said that fairminded men might differ as to the conclusions of fact to be drawn from the evidence, the issue must go to the jury. Swift & Co. v. Morgan & Sturdivant, 214 F. 2d 115, 49 A.L.R. 2d 924 (5th Cir. 1954). But, when the evidence and the inferences to be drawn therefrom are such that reasonable men could reach only one conclusion, the court should direct a verdict, or, when this was refused by the court, enter judgment notwithstanding a verdict to the contrary. Seaboard Properties, Inc. v. Munchman 278 F. 2d 679 (5th Cir. 1960).

The nature of the event which plaintiff sought to prove, an unexpected explosion, required that heavy reliance be placed on reasonable inferences to be drawn from the provable basic facts. As counsel for plaintiff phrased it, the alleged explosion did not occur on the atomic proving grounds. There were no carefully placed instruments to sense and record heat, pressure and light phenomena so as to more or less conclusively demonstrate whether an explosion had occurred. Instead, plaintiff had to rely on evidence of the attendant circumstances and the results from which the ultimate fact might be inferred. If it may be legitimately inferred from that evidence that an explosion caused the collapse of the beanhouse, then judgment could not be entered contrary to the verdict of the jury.

Evidence may be of such a character as to legitimately allow contrary inferences, in which case it would be the

jury's duty to resolve the conflict. In judging the validity of the jury's resolution of that conflict, the court would have to accept the inference which supported the verdict. But if the conflicting inferences are evenly balanced, neither one is legitimate, and the jury's selection of one or the other could be based on nothing more than conjecture. Such evidence is probative of nothing and the party who depends upon it for an essential element of his claim for relief must fail. Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S.Ct. 391, 77 L.Ed. 819 (1933); Ralston Purina Co. v. Edmunds, 241 F.2d 164 (4th Cir. 1957). A legitimate inference, while impossible of definition with mathematical precision, may be said to arise when the evidence offered makes the existence of the fact to be inferred more probable than the non-existence of the fact. 2B Barron & Holtzoff, Federal Practice & Procedure § 1075 (Wright Ed. 1961). Further, an inference is not legitimate if it is in conflict with undisputed physical laws and facts or uncontroverted clear testimony. Lewis v. Nelson 277 F.2d 207 (8th Cir. 1960); Kansas City Public Service Co. v. Shephard, 184 F.2d 945 (10th Cir. 1950); Shaw v. Edward Hines Lumber Co., 249 F.2d 434 (7th Cir. 1957).

Certain portions of the plaintiff's evidence here suffers from one or more of these vices. The testimony of the eight employees is at best equivocal insofar as it is relied upon to prove an explosion. In sum, they testified to hearing certain sounds and seeing certain events which are all consistent both with plaintiff's theory of an explosion and defendant's theory of structural failure. The sounds described could have originated equally as well from the breaking and collapsing of the large, all metal beanhouse, as from a dust explosion. Their visual impressions were to the same effect: the various ways in which they described the dust coming out of the building are consistent with both theories; the metal flying off from the building can be as readily explained by the tearing, stretching and compression of the metal skin as the building gave way, as it can

by an explosion within; and the manner in which the building settled is no more enlightening. Their testimony and the inferences to be drawn from it are equally consistent with both theories and probative of neither. There is no basis for a rational choice between the two alternatives. Ralston Purina Co. v. Edmunds, supra.

The evidence which describes the position and characteristics of the remains of the structure after the event falls in the same category. Nothing contained therein suggests that the occurrence of an explosion was any more likely than collapse from structural failure. The same may be said of the testimony of the chemist who found carbon in one of two dust samples. That sample was taken from the beans in the damaged portion of the beanhouse, and carbon constituted 2% of the dust, by weight. No carbon was found in the dust taken from the other end of the beanhouse. As a result of the loading technique, the beans often contained significant parts of foreign matter. The burned residue of any such substance could easily be picked up in the bean harvest or in the transportation of the beans and transmitted to the beanhouse. In addition, acetylene cutting torches were used in the damaged portion of the building in the salvage operations, and their use could account for the presence of carbon. Carbon itself is a basic element and the presence of varied kinds of foreign matter in the beans makes the presence of one more kind equivocal on the present issue.

If plaintiff relied on the evidence just reviewed, and nothing more, the jury could not have been permitted to infer that an explosion had destroyed the beanhouse. It would have been the court's duty to direct a verdict for defendant, and having declined to do so, to now enter judgment as if this had been done. If plaintiff is to avoid this fate now, it must do so on the basis of its second expert, the engineer, and the extra-judicial statements of defendant's employee, as related by plaintiff's witnesses.

Before examining this evidence, it is appropriate to discuss the physical laws which are applicable here. The parties agree, and the court would judicially note if they did not, that there are three prerequisites to a combustion explosion. First, there must be an explosive mixture. Second, the mixture must be adequately confined or contained. Third, the mixture, so contained, must be ignited. The parties also agree that a phenomenon known as a bean dust explosion can occur, and that at a certain minimum ratio of bean dust to air, an explosive mixture is obtained if the dust is dispersed and suspended in the air. Viewing the evidence most favorably for plaintiff, it must be taken as established that the soybean dust in the beanhouse, if suspended in the atmosphere in correct proportions, would provide an explosive mixture. And, evidence of a spark inside the building given by one witness who was there when the incident occurred would support a finding of a source of ignition. The verdict is on sound ground as to these two points.

Assuming then the presence of the first and third elements, i.e., explosive mixture and ignition, the difficulty here is with the second element, containment. Again the parties agree that this element is a relative matter. If an explosive mixture is placed in a container and ignited, the occurrence of an explosion rather than mere burning depends upon the relationship between the amount of explosive mixture present and the quantity of space in the container. If there is present a sufficient amount of the explosive mixture, its ignition and rapid burning will produce pressure and temperature increases which will encounter the resistance of the container with enough energy to result in an explosion. But if the disparity in the two quantities is too great, or if the container is incomplete so that venting is available at too great a degree, the expanding forces will dissipate their energy before they reach the interior surfaces of the container, or in the case of excessive venting, will relieve their pressures by way of the venting at a rate sufficient to prevent an explosion. To illustrate, the vapor arising from a

teaspoon of gasoline in the middle of an auditorium, although ultimately confined, would not produce an explosion if ignited; there would only be a flash fire, a harmless puff. But, the same vapors, enclosed in a pill bottle, could readily produce an explosion when ignition is supplied.

The containers available to plaintiff to support its theory of an explosion are limited. One possible way of providing containment would be to place the explosion within the confines of some smaller structure inside the beanhouse. Such an explosion chamber might support an explosion which would trigger the failure of an adjacent structural member that would in turn trigger the collapse of the building. The only such structures inside the beanhouse were the monitor and the overhead conveyor which it contained. As will be shown, these two areas and theories supporting both must be eliminated.

Most significant, plaintiff itself rejected these and instead predicated its case on the occurrence of an explosion below the monitor. Plaintiff's engineer testified to this effect and expressly denied that the explosion occurred up in the monitor, and plaintiff's counsel adhered to this theory throughout the trial, as is apparent from the oral argument on the instant motion. These considerations are sufficient to eliminate the theory of an explosion within the monitor area. However, it should also be noted that the damage to the monitor is not reasonably traceable to an explosion but instead appeared to be solely the result of its displacement in the ultimate collapse. Finally, the theory of this witness, upon which plaintiff must stand or fall, was that an explosion lifted the roof and allowed the walls to give way, after which the roof settled back down. An explosion in the monitor area, *above the roof,* could not have this effect.

The only alternative is to place the explosion in the beanhouse proper, thus depending on the confines of the entire structure to provide the containment. Returning to the relative concept of containment, it is clear that if the volume

of explosive dust had been large enough, the beanhouse itself could serve as the explosion chamber, but if the dust were not that extensive its ignition would generate, at most, only a flash fire, incapable of explosively causing structural damage—the pressure and heat increases would dissipate their energy at some point between the outer limits of the dust and the interior surfaces of the beanhouse.

In the circumstances disclosed here, obviously plaintiff had to introduce legally sufficient evidence that the beanhouse provided the necessary element of containment. This it did not do. In fact, no attempt was made to do so. Plaintiff's expert on this matter, the engineer, testified that the explosion did not involve the whole building but instead occurred in only a small area near its center. It was his opinion that if the whole building had been involved *it would have been totally destroyed.* If, as plaintiff's case requires, a small explosion exerting pressure on a localized part of the beanhouse is at least sufficient to cause the failure of that part of the structure, the conclusion is inescapable that this witness was correct in the last stated opinion, for an explosion involving the whole building and depending on the beanhouse itself for the element of containment would undoubtedly exert proportionately magnified pressures on all interior surfaces, with correspondingly greater effect.

Also conclusive against this possibility was the undisputed survival of the event by the two men in the south, i.e., the damaged part of the beanhouse. They suffered no harm and the one who testified experienced no temperature or pressure increases, as he undoubtedly would have done if the expanding forces of such an explosion had occurred in, or passed through, his position. If such forces dissipated before they encountered this witness, they necessarily dissipated before they encountered the containment offered by the building.

Plaintiff is thus reduced to proving an efficient explosion of a limited nature occurring out in the open space near

the center of the beanhouse, which utilized some containing factor *not shown to exist by any evidence* in the record. Although this is contrary to immutable physical laws, and therefore impossible, this is exactly what plaintiff attempted to do. This brings us at last to a detailed consideration of the testimony of plaintiff's engineer.

As aforementioned, he theorized a small local explosion near the center of the beanhouse, which did not involve the whole building and which did not extend up into the monitor area. He stated plaintiff's basic theory, that the dropping beans generated an explosive cloud of bean dust in the vicinity of the overhead spout then in use; that a piece of "tramp" iron or rock passed through the auger, and, on falling through the spout, struck a baffle immediately under the monitor; and that this contact created a spark which ignited the cloud and caused the explosion. Portions of his testimony on cross-examination are significant:

Q. And this cloud of dust was out in the open?
A. Yes.
Q. It was not confined or contained in any fashion?
A. *We assume not, no.* (Emphasis added.)

Discussing the analogy of a gas stove leaking gas, but leaking enough to cause only a puff instead of an explosion when ignited, the witness explained that this resulted from the relationship between the amount of vapor and the area which it occupied. His cross-examination continued, as follows:

Q. In other words, you had no containment in a large area, is that right?
A. That's right.
Q. And the explosion you are talking about is an explosion involving no containment in a large area, isn't it, Mr. ————?
A. Yes.

In one breath the witness correctly explains the reason for the lack of explosion in the gas stove analogy, and in the next he agrees that the same circumstances apply to the explosion which he claims occurred in the beanhouse. In short, his opinion is in direct conflict with established physical laws, just as are the inferences plaintiff seeks to draw from the remainder of the evidence. In this light, the language of the court in Weinberg v. Northern Pacific Railway Company, 150 F.2d 645 (8th Cir. 1945), expressing a rule found in a multiude of decisions, is applicable to this opinion.

> (O)pinions not supported by facts, and which are contrary to the physical facts and do violence to scientific principle or reason, are robbed of all probative value.

The extra-judicial statements of defendant's employee as related by plaintiff's witnesses are subject to the same limitation. Plaintiff offered evidence of these statements as representative admissions of a party-opponent which are probative of the occurrence of an explosion as alleged in the complaint.[2] Granting these statements dignified status as substantive proof of the elements of plaintiff's claim for relief, and viewing them in the light most favorable to that claim, they amount to no more than an opinion that a bean dust explosion occurred which resulted in the collapse of the beanhouse. Nothing in the statements attributed to this person supplied the deficiency in the evidence which the court regards as conclusive against the plaintiff's claim, i.e., *the absence of any evidence to show any adequate containment.* In short, his belief that an explosion occurred, conflicting as it does with the established physical laws and uncontroverted facts discussed above, is not probative evi-

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[2] Plaintiff did not urge, nor did it attempt to prove, that this person had real or apparent authority to bind the defendant by statements admitting and accepting liability. See Restatement, Agency § 288 (2).

dence that an explosion did occur. Weinberg v. Northern Pacific Railway Company, supra.

In summary, the inferences which plaintiff asked the jury to draw from the evidence are equivocal and thus incapable of being legitimately drawn. In addition, the testimony of plaintiff's expert, the engineer, and the opinion of defendant's employee (said to have been expressed extrajudicially) are shown to be contrary to scientific principle and thus without probative value, and the explosion theory postulated by plaintiff is likewise shown to be in irreconcilable conflict with established facts and physical laws. There was no substantial evidence to support the jury's verdict for plaintiff, the motion for a directed verdict should have been sustained, and the present motion by the defendant for judgment in accordance with its motion for a directed verdict should, and will, be sustained, with judgment entered accordingly.

This leaves for consideration the alternative motion for a new trial, upon which a ruling should be made conditioned on reversal or vacation of teh judgment for defendant notwithstanding the verdict for plaintiff. Rule 50(c) (1), Federal Rules of Civil Procedure; Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940). In the event that it should be determined on appeal that this court has erred in holding that there was no substantial evidence to support a verdict for plaintiff, the verdict of the jury cannot stand. The analysis of the plaintiff's evidence heretofore made, as well as consideration of evidence produced by the defendant, compels the conclusion that the verdict is contrary to the overwhelming weight of the evidence. Therefore, if this judgment should be vacated or reversed on appeal, the verdict of the jury will be set aside and a new trial ordered.

An order will be entered in accordance with the foregoing.